

**THE HIGH COURT**

[2022] IEHC 23

**Record No.: 2021/10 MCA**

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 TO 2020**

**AND**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)**

**BETWEEN:**

**KILSARAN CONCRETE UNLIMITED COMPANY**

**APPLICANT**

**AND**

**O'REILLY OAKSTOWN LIMITED AND O'REILLY BROS LIMITED**

**RESPONDENTS**

**EX TEMPORE JUDGMENT OF MS. JUSTICE SIOBHÁN PHELAN DELIVERED ON 18 JANUARY, 2022**

**INTRODUCTION**

1. This judgment is delivered in respect of an application to have the within proceedings under s. 160 of the Planning and Development Act, 2000 (as amended) remitted to the Circuit Court for hearing on the Eastern Circuit in the County of Meath.
2. The application is brought having regard to the undisputed value of the lands the subject of the application at €950,000 which is such as to vest the Circuit Court with jurisdiction pursuant to s. 160(5)(a) & (b) of the Planning and Development Act, 2000 [hereinafter "the 2000 Act"].
3. The parties to the proceedings are companies involved in the manufacture of concrete products. Both applicant and respondent sides have commercial interests in that sector.
4. It is not in contention that the respondents' site has been in use in the concrete industry since the late 1960s to the early 1970s and was acquired by the respondents as a going concern in or about 2003. However, there is no agreement as to extent and nature of the use at the site throughout that period and whether the existing use is amenable to enforcement action under s. 160 of the 2000 Act.

**PROCEEDINGS TO DATE**

5. The proceedings were instituted by originating notice of motion on the 18th January, 2021.
6. The application to remit was brought on the 24th March, 2021 and was heard on the 17th January, 2021.
7. The fact that the application to remit was pending did not disrupt the progress of the proceedings and some seventeen affidavits have been filed in the proceedings with the latest affidavit filed on the 22nd October, 2021.
8. Whilst the applicant maintains that the pleadings are now closed, this was not accepted by the respondents during the hearing of the motion.

9. An application for a date for hearing was made by counsel for the applicant in November, 2021. The respondents were represented in that list but through some breakdown in communication were taken by surprise to learn during submissions in the course of the remittal application that the case had been assigned a date for hearing in the High Court in May, 2022. A question must arise in respect of the viability of this date in circumstances where it appears to have been fixed without reference to the fact that it is envisaged, at least insofar as the respondents are concerned, that there will be a need for cross-examination in this case having regard to disputed matters of fact arising from the conflicting contents of affidavits filed.
10. The principal reliefs sought in the proceedings are standard s. 160 orders being orders restraining the respondents from carrying out unauthorised development over lands occupied or under their control at Oakstown, Trim in the County of Meath and orders requiring the removal of structures identified on the face of the notice of motion as being unauthorised structures which have been erected on site.
11. It is clear from the pleadings and from the oral submissions to the Court that there are significant disputed issues of mixed law and fact in these proceedings. By way of example only, there is dispute as to:
  - a) the effect of a planning permission which was granted in 1982;
  - b) the extent to which a user of the site is covered by the said planning permission or is otherwise protected from enforcement action by virtue of a long user;
  - c) whether there has been an intensification of use;
  - d) whether the use constitutes a new use (as to whether because of production of ready mix concrete is different or materially different to production of pre-cast concrete);
  - e) the implications, if any, of a decision of An Bord Pleanála to refuse permission for development on site in determining the lawfulness of the current use of the site;
  - f) the extent to which development on site can properly be considered to be exempted development;
  - g) the implications, if any, of the Habitat's Directive.

**APPLICATION TO REMIT**

12. The respondents in moving the application maintain that O'Reilly Concrete of Oakstown is a small operation which is prejudiced by the maintenance of the proceedings in the High Court.
13. Reliance is placed by the respondents on the fact that both the applicant and respondents are based in County Meath and the lands which are the subject of the proceedings are located in Co. Meath.

14. The respondents point to the volume of pleadings and contend that the case is likely to take a number of days at hearing, particularly in view of the evident contest as to fact and the need for cross-examination.
15. In terms of specific prejudice, the respondents are concerned by exposure to increased costs should the case proceed in the High Court, even in circumstances where the applicants have confirmed on affidavit that they will limit their costs to Circuit Court costs. It is pointed out that this does not address the fact that the respondents will incur increased costs in preparing a case for hearing in the High Court. Counsel for the respondents points to the fact that it is common case that the Environment (Miscellaneous Provisions) Act, 2011 (as amended) may have application to these proceedings with the result that the Respondents will not benefit from a differential costs order and may not recover costs as against the applicant even if successful in defending the application and establishing that it was unmeritorious.
16. The respondents contend that the issues in the case are "straightforward" and are questions typical of s. 160 applications which are routinely determined before the Circuit Court.
17. The applicant acknowledges that the Circuit Court and the High Court have concurrent jurisdiction having regard to the undisputed market value of the lands but maintains that it is reasonable and appropriate to bring and maintain proceedings in the High Court. They rely on what they say is the serious nature of the alleged planning breaches taking place on the site, the size of the site (in excess of three hectares), its turnover (given by the respondents as €4 million in 2020) and the scale of its operations (in excess of twenty employees).
18. It is further contended that the complaints raised in the proceedings give rise to significant, novel and complex factual, planning and legal issues, which merit careful consideration and a written judgment from the High Court.
19. The applicant points out that the hearing will be no shorter in the Circuit Court than in the High Court. Reliance is placed on the possibility of the matter proceeding as a remote hearing in Dublin thereby avoiding the necessity for parties to travel to Dublin. Alternatively, reference is made to the relatively short distance between Dublin and Meath with the result that witnesses would not be significantly inconvenienced by having to travel to Dublin. Difficulties in securing a hearing date in the Circuit Court in Meath are also advanced as support for continuing with the application in the High Court.
20. Given the nature of the complaints advanced in the proceedings, the applicant contends that it is unsatisfactory for the Respondents' operations to continue without restriction where the Applicant proceeds to make out its entitlement to the relief claimed with the result that it is important that the application receive a hearing date without delay.
21. A legal argument was advanced to the effect that the Court has no jurisdiction to remit a s. 160 application in circumstances where s. 160(5)(d) provides in express terms for

mandatory transfer from the Circuit Court to the High Court where application is made on the basis that the land value exceeds the Circuit Court jurisdiction but no similar provision is made for remittal to the Circuit Court from the High Court.

#### **DECISION**

22. The jurisdiction of the Circuit Court is established in the following terms in s. 160(5) of the Planning and Development Act, 2000 (as amended):

“(5) (a) An application under this section to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the land which is the subject of the application is situated.

(b) The Circuit Court shall have jurisdiction to hear and determine an application under this section where the market value of the land which is the subject of the application does not exceed €3,000,000.

(c) The Circuit Court may, for the purposes of paragraph (b), in relation to land that has not been given a market value or is the subject with other land of a market value, determine that its market value would exceed, or would not exceed, €3,000,000.

(d) Where the market value of any land which is the subject of an application under this section exceeds €3,000,000, the Circuit Court shall, if an application is made to it in that behalf by any person having an interest in the proceedings, transfer the proceedings to the High Court, but any order made or act done in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court by order.

(e) In this subsection 'market value' means, in relation to land, the price that would have been obtained in respect of the unencumbered fee simple were the land to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land.”

23. The Court is satisfied that it has jurisdiction to remit the within proceedings, notwithstanding the absence of express provision for same in s. 160 itself and notwithstanding the terms of s. 160(5)(d) which provide in express terms for transfer from the Circuit Court to the High Court.

24. The Court's jurisdiction to remit is long established under s. 25 of the Courts of Justice Act, 1924 (as amended) and s. 11 of the Courts of Justice Act, 1936 (as amended) and is not affected by the terms of s. 160(5)(d). Section 25 of the Courts of Justice Act 1924 provides as follows:

“25.— When any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may, at any time before

service of notice of trial therein, apply to the High Court that the action be remitted or transferred to the Circuit Court, and thereupon, in case the court shall consider that the action is fit to be prosecuted in the High Court, it may retain such action therein, or if it shall not consider the action fit to be prosecuted in the High Court it may remit or transfer such action to the Circuit Court or (where the action might have been commenced in the District Court) the District Court, to be prosecuted before the Judge assigned to such Circuit or (as the case may require) the Justice assigned to such District, as may appear to the High Court suitable and convenient, upon such terms, in either case and subject to such conditions, as to costs or otherwise as may appear to be just: Provided that the High Court shall have jurisdiction to remit or transfer any action, whatever may be the amount of the claim formally made therein, if the court shall be of opinion that the action should not have been commenced in the High Court but in the Circuit Court or in the District Court if at all."

25. The legal test governing the High Court's discretion to remit proceedings has been modified by s. 11(2) of the Courts of Justice Act 1936 as follows:

"(2) Notwithstanding anything contained in section 25 of the Principal Act the following provisions shall have effect in relation to the remittal or transfer of actions under that section, that is to say:— (a) an action shall not be remitted or transferred under the said section if the High Court is satisfied that, having regard to all the circumstances, and notwithstanding that such action could have been commenced in the Circuit Court, it was reasonable that such action should have been commenced in the High Court;\* (b) an action for the recovery of a liquidated sum shall not be remitted or transferred under the said section unless the plaintiff consents thereto or the defendant either satisfies the High Court that he has a good defence to such action or some part thereof or discloses facts which, in the opinion of the High Court, are sufficient to entitle him to defend such action."

26. These provisions are in turn reflected in Order 49 of the Rules of the Superior Court.

27. It is clear from the terms of the express power vested in the Circuit Court under s. 160(5)(d) to transfer to the High Court that the Oireachtas was legislating to validate any order or act done in the course of proceedings before transfer, which orders or acts would otherwise have been rendered ultra vires for want of jurisdiction. Similar considerations do not arise upon a remittal to the Circuit Court in circumstances where no issue arises as to the High Court's jurisdiction to make orders in reliance on section 160 in a case which could have been commenced in the Circuit Court. Accordingly, there was no necessity to make further provision for the validity of orders or actions of the High Court in the event of a remittal to the Circuit Court. The Oireachtas in making special provision for orders or acts of the Circuit Court made in want of jurisdiction having regard to: (i) land valuation; and (ii) where there is an objection to jurisdiction, cannot properly be understood to have silently removed the long-standing jurisdiction of the High Court to remit proceedings which could also properly be pursued before the Circuit Court. Were this the proper

interpretation of the effect of s. 160(5)(d) it would be a radical departure from the established jurisdiction of the High Court. Such a radical departure would have required express provision. Having regard to the concurrent statutory jurisdiction of the High Court under section 160, the existing statutory provision for remittal and in circumstances where the High Court is vested full and original jurisdiction under Article 34 of the Constitution, there was no necessity to further legislate for a remittal in the 2000 Act.

28. As seen from the terms of s. 25 of the 1924 Act and s. 11 of the Courts of Justice Act, 1936, while the Court has a power to remit the within proceedings, it is not obliged to do so simply because the Circuit Court has jurisdiction. The legislative policy underlying these provisions is important. It has been described as a form of:

“legal decentralisation so that litigants are thereby encouraged and facilitated in commencing their proceedings at the lowest level of the legal system appropriate to those proceedings” (Hogan J. at paragraph 23 of his judgment in *AIB v. Gannon* [2018] 2 I.R. 239, 246).

29. The principles guiding the exercise of the Court’s discretion have been set out in a number of cases which were opened to the Court by the parties. The Court relies on a succinct summary of this jurisprudence contained in the judgment of Simons J. in *Everyday Finance DAC v. Mary Burns and Gerald Burns* [2021] IEHC 105 at para. 12 in the following terms:

“12. As appears, the High Court in deciding whether to remit proceedings to the Circuit Court must consider whether it was “reasonable” to have commenced the action in the High Court. The interpretation of section 11(2) of the 1936 Act has been considered recently by the Court of Appeal in *Allied Irish Banks v. Gannon* (cited earlier). Hogan J. (delivering the unanimous judgment of the Court of Appeal) referred to the two leading authorities on the interpretation of the section, *Stokes v. Milford Co-Operative Creamery Ltd.* (1956) 90 I.L.T.R. 67, and *O’Shea v. Mallow Urban District Council* [1994] 2 I.R. 117. Hogan J. then summarised the factors which might be taken into account in deciding whether it was “reasonable” to commence proceedings in the High Court as follows (at paragraphs 26 and 27 of the reported judgment).

“[...] There may well be cases where for any number of reasons it was reasonable to commence the proceedings in the High Court in the sense contemplated by the sub-section. Thus, for example, the proceedings may be linked or otherwise bound up with existing High Court proceedings or where all the witnesses were based in Dublin where the alternative was a Circuit Court hearing at a rural venue or where the case raised an unusually important point of law suitable for adjudication by the High Court. Depending, of course, on the facts of the particular case, these examples might well amount to instances where the High Court might be satisfied within the meaning of s. 11(2)(a) of the 1936 Act that it was reasonable to commence the proceedings in that forum.

[27] Can, however, the same be said in the present case? There is nothing in the pleadings to suggest that the present proceedings are anything more than a routine application under s. 74 of the 2009 Act seeking to have an inter-spousal transfer of a share in a family home set aside. Quite apart from the fact that no affidavit has been filed by AIB addressing any of these points, there has been no suggestion that there is anything unusual or special about these proceedings. Everything instead points to the fact that this is a case which is entirely Cork based and which ought really to be heard by the Circuit Court in that venue. Utilising the wording of s. 25 of the 1924 Act it can therefore be said that the present proceedings are not really fit to be prosecuted in the High Court and that it was not reasonable within the meaning of s. 11(2)(a) of the 1936 Act that they should have commenced in that court. Adopting the language of Dixon J. in *Stokes v. Milford Co-operative Creamery Ltd.* (1956) 90 I.L.T.R. 67 it may be said that there are no specific circumstances by reason of which the action ought to have been brought in the High Court."

30. Applying these principles to the circumstances of the case before the Court, I am satisfied that an order for remittal should be made.
31. In arriving at this decision, I note that none of the factors identified by Hogan J. in *AIB v. Gannon* are present or present to a sufficient degree to warrant retaining this matter in the High Court. So, for example, the case is not linked with existing High Court proceedings. Furthermore, not only are the relevant lands located within the jurisdiction of Meath Circuit Court but many of the witnesses are too.
32. The Court has not been persuaded that the proceedings raise an unusually important point of law suitable for adjudication in the High Court such as the "significant question of statutory interpretation" identified by Simons J. in *Promontoria (Oyster) Designated Activity Company v. Kean* [2021] IEHC 796. Furthermore, it is not evident that the case gives rise to any novel issue of law which might benefit from a written judgment of the High Court.
33. A feature of the case which would explain a decision to bring proceedings in the High Court rather than in the Circuit Court is the scale of what is involved at the site and the potential wider implications of orders being made or refused in the s. 160 application. From the photographic evidence before the Court it is evident that the site is extensive. The visual impact alone is significant. These factors weigh in favour of the proceedings being retained in the High Court but are not determinative in my opinion. The intention of the Oireachtas in providing for a jurisdiction in the Circuit Court where the land value does not exceed €3million would appear to have been to permit applications to be brought under the 2000 Act notwithstanding that the orders sought have far reaching implications. This is but one example of the far-reaching nature of jurisdiction vested in the Circuit Court by statute. Accordingly, I am not persuaded that the scale of the development and use in issue in these proceedings is enough to warrant a departure from a policy of legal decentralisation which has been identified as underpinning the amendment to section 160.

34. I do not agree with the characterization of the respondents' counsel of the issues raised in the proceedings as "straightforward" as the Court hearing the action will undoubtedly be required to consider conflicting evidence and make findings of fact before considering the proper application of the law. However, I agree with Counsel for the respondents that these features of the case are not of sufficient basis to retain the proceedings in the High Court as it is surely part and parcel of the ordinary work of the Circuit Court, just as it is the High Court.
35. The fact that a date has been assigned in the High Court and no date has yet been obtained in the Circuit Court is a factor that I have weighed. This Court cannot attach undue significance to this fact in circumstances where the date in the High Court was assigned on what appears to be the mistaken basis that the hearing would proceed on affidavit and without the necessity for oral evidence. The prospect of retaining the date assigned on an incorrect premise is therefore uncertain. The Court is not satisfied that the prospects of securing and preserving a hearing date are better in the High Court than in the Circuit Court. Furthermore, were it to do so it would be at the expense of other cases where the High Court is the only appropriate forum.
36. The question of costs is relevant and while the applicant has confirmed that it is willing to confine its costs to those which it would be entitled to in the Circuit Court, this is only a partial answer to the respondents' concerns. Even with this concession from the applicant, the respondents must nonetheless bear the costs of presenting a case in the High Court in circumstances where the costs protection provisions of the Environment (Miscellaneous Provisions) Act, 2011 (as amended) are argued to have application. If this position is maintained and endorsed by a Court following the conclusion of the case, safeguards such as a *differential costs order* (referred to by the Court of Appeal in *Morgan & Anor. v. Slaneygio Limited & Anor* [2019] IECA 155 and Simons J. in *Promontorio (Oyster) Designated Activity Company* [2021] IEHC 796) or an order for costs against an unsuccessful applicant, do not avail the respondents.
37. Weighing all of the identified considerations and having particular regard to access to justice considerations, the policy objectives underpinning legislative provision for an increased jurisdiction in the Circuit Court and the additional cost of maintaining proceedings in the High Court as opposed to the Circuit Court, this Court concludes that the factors weighing in favour of the proceedings being remitted for hearing before the lower court of competent jurisdiction prevail over the countervailing considerations which arise principally in the Court's assessment from the scale of the operation and the potential implications of the orders sought.

#### **CONCLUSION AND FORM OF ORDER**

38. For the reasons set out, in all of the circumstances of this case, it is not reasonable to maintain the proceedings in the High Court and the Court will make an order remitting the proceedings to the Circuit Court in County Meath.
39. I will hear the parties as to costs.